IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4193 OF 2001

Union of India,
through General Manager,
Central Railway, C.S.T., Mumbai & anr. ... Petitioners

V/s

Miss Indira Rai,
45/253, Amantran CHS, Sector -2,
Charkop, Kandivali (E), Mumbai-67;
& ors. ... Respondents

Mr. Suresh Kumar for the petitioners.

Mr. R.G. Walia with Mr.G.S. Wali for the respondent No.1.

None for the respondent Nos. 2 to 4.

CORAM: H.L. GOKHALE &
J.H. BHATIA, JJ.

DATED: 21ST JUNE, 2006

ORAL ORDER (Per Gokhale, J.):

1. Heard Mr. Suresh Kumar for the petitioners. Mr. R.G. Walia appears for the respondent No.1. Other respondents are served.

2. This petition filed by the Union of India for Central Railway seeks to challenge the order dated 19.2.2001 passed by the Central Administrative Tribunal,

Mumbai, in Original Application No. 570 of 2000 which was filed by the respondent No.1 and which came to be allowed by the Tribunal.

3. The respondent No.1 was working as an Enquiry-cum-Reservation Clerk ("ECRC" in short) in Central Railway. She alongwith many others including respondent Nos. 2 to 4 appeared for the selection test to the post of Console Operator. The conditions of eligibility for the candidates permitted the candidates to be from two different pay scales i.e. Rs.1600-2660 (RPS) and Rs.1400-2300 (RPS). The candidates, of course, had to be ECRC to apply for that post.

4. When the test was held and marks were given, the respondent No.1 stood at position No.1 over the other including respondent Nos. 2 to 4 amongst others. She was accordingly promoted. However, after three years of working in that promoted post, her seniority was changed, and she was shown below respondent Nos. 2 to 4.

5. This led her to file the above Original Application. In that proceeding she took out an interim application and an order was passed thereon whereby her seniority position was restored. That continued during the

pendency of the original application which finally came to be allowed by the impugned order.

6. The case of the petitioner was simple, namely, that when candidates were permitted to contest from two different pay scales and thereafter when the merit list is drawn, one who is at the higher position will have to be treated on that particular higher seniority. It is material to note that the respondent Nos. 1 and 2 Railways all throughout treated this post of Console Operator as Ex-Cadre Post. The petitioner relied upon Clause (i) of Rule 219 of the Indian Railway Establishment Manual. This rule reads as under:-

> "**Clause (i) :** For general posts i.e. those outside the normal channel of promotion for which candidates are called from different categories whether in the same department or from different departments, the selection procedure should be as under:-
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> (i) All eligible staff irrespective of the department in which they may be working, who satisfy the prescribed conditions of eligibility and volunteer for the post should

be subjected to a selection which should consist of both written test and viva-voce test; and

(ii) The Selection Board should call for viva-voce test all candidates who secure not less than 60% marks in the written test. The final panel should be drawn up on the basis of marks obtained in the written and viva-voce test in accordance with the procedure for filing selection posts."

As far as the petitioner railways are concerned, they took a stand that this selection and seniority thereof will be governed by Clause (j) of Rule 219 of the Indian Railway Establishment Manual, which reads as under:-

"Clause (j): The names of sslected candidates should be arranged in order of seniority but those securing a total of more than 80% marks will be classed as outstanding and placed in the panel appropriately in order of their seniority allowing them to supersede not more than 50% of total field of eligibility."

7. The Tribunal which heard the matter, noted the conditions of eligibility and the fact that this was a ex-cadre post. That being the position, the Tribunal held that, when it is an ex-cadre post and the panel is to be drawn on the basis of marks obtained on the basis of viva-voce and written test it is implicit that the seniority in such a ex-cadre post will be based on merit only.

8. The Tribunal noted the submission of the petitioner that though the selection is for the ex-cadre post, the inter-se seniority even in respect of ex-cadre post will have to be prepared on the basis of Clause (j). This is seen from para 6 of the order of the Tribunal. The Tribunal held that it has no hesitation in holding that in respect of ex-cadre posts, the procedure to be applied will be that contained in Clause (i) and not clause (j).

9. The view of the Tribunal has been that, Clause (j) requires that names of the selected candidates to be arranged in order of seniority. It is implicit therein that the persons will have to be in prior common seniority and, therefore, Clause (j) will not apply when they are from different cadres or pay scales. In our

view, there is no fault in the view taken by the Tribunal on the submissions that were raised before the Tribunal. We have been shown the reply that was filed by the petitioenr railways to the Original Application and this is the only submission raised by them before the Tribunal.

10. Mr. Suresh Kumar submitted before us that Rule 320 of the Indian Railway Establishment Manual is the material rule and it applies whether it is a selection post or a non-selection post. This rule reads as under:

> **"Rule 320:** Relative Seniority of Employees in an Intermediate Grade Belonging to Different Seniority Units Appearing for a Selection/Non-Selection Post in Higher Grade.- When a post (selection as well as non-selection) is filled by considering staff of different seniority units, the total length of continuous service in the same or equivalent grade held by the employees shall be the determining factor for assigning inter-seniority irrespective of the date of confirmation of an employee with lesser length of continuous service as compared to another

> unconfirmed employee with longer length of continuous service. This is subject to the proviso that only non-fortuitous service should be taken into account for this purpose."

11. Mr. Suresh Kumar appearing for the petitioners relied upon the judgment of the Apex Court in the case of **Anil Srivastava v/s U.O.I. & ors., reported in 2001 (5) Supreme 592.** If we peruse the order of the Apex Court in that judgment, it is seen that the appellant was working as Junior Chemical and Metallurgical Assistant in the higher pay scale of Rs.380-560 before his promotion to the post of Welfare Inspector. The private respondents were working as clerks in the grade of Rs.260-400 or Rs.330-560. Both of them having been promoted in the post of Welfare Inspector, the appellant was placed on a higher seniority position. That seniority position having been withdrawn, the further proceedings followed. The Apex Court noted in para 6 of its order that, Rule 320 requires the total length of continuous service to be considered whether it is a selection post or it is a non-selection post when persons are drawn from different cadres. However, it is

material to note what the Court has noted further in this matter. The Court has observed that -

> "If there would have been a selection list on the basis of their merit, merit could have been a germane criteria, but it is not known whether while selecting them for appointment to the post of Welfare Officer, the list was drawn on the basis of their respective merit."

In the present case, clearly, the list was drawn on the basis of merit and, therefore, the reliance of Mr. Suresh Kumar on this judgment in the case of Anil Srivastava, is misplaced.

12. Mr. Walia, appearing for the respondent No.1 relied upon another judgment of the Apex Court in the case of **M.Ramjayaram v/s General Manager, South Central Railway & ors., reported in 1996 SCC (L&S) 890.** In that matter, the persons concerned were not from the same seniority unit but from different units and Rule 320 was sought to be applied. The Apex Court held in para 5 that, since the contesting respondents were not from the same unit but of different units, Rule 320

stands excluded.

13. That apart, to evoke Rule 320, the petitioners must place seniority position of the concerned candidates. That was neither placed before the Tribunal nor is it placed before this Court. The petitioners ought to have laid the foundation for that purpose by showing as to what was the continuous service of the candidates concerned. That was not done nor the plea was raised based on Rule 320. In the circumstances, we cannot permit such a plea to be raised here in the High Court for the first time. This is apart from the submission of Mr. Walia that Rule 320 itself will not apply.

14. In view of what is stated above, we have no reason to interfere in the order passed by the Tribunal and, therefore, the petition is dismissed with no order as to costs.

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(H.L. Gokhale, J.)

(J.H. Bhatia, J.)